

Arbitration Hearings

Non-Party Witness' Attorney May Attend Hearing While Witness Is Testifying

Effective Date: October 14, 2010

Executive Summary

Effective October 14, 2010, a non-party witness' attorney may attend an arbitration hearing while the witness is testifying. Unless otherwise authorized by the arbitrators, the attorney's role will be limited to asserting recognized privileges, such as the attorney-client and work-product privileges, and the privilege against self-incrimination.¹ The amendments to the Customer and Industry Codes of Arbitration Procedure (Codes) apply to all hearings taking place on or after October 14, 2010. The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Background & Discussion

A non-party witness may testify at a hearing: 1) voluntarily; 2) pursuant to a subpoena;² or 3) in compliance with an arbitrator's order for an associated person to appear and give testimony.³ For example, a customer claimant may not have named the broker who handled the customer's account as a respondent in a case, but the broker may be called to testify at the FINRA arbitration hearing. In such a case, if the broker wants to bring an attorney to the hearing, the Codes currently provide that the arbitrators will determine if the attorney may attend.⁴

September 2010

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Attendance at Hearings
- ▶ Code of Arbitration Procedure
- ▶ Dispute Resolution

Referenced Rules & Notices

- ▶ FINRA Rule 12512
- ▶ FINRA Rule 12513
- ▶ FINRA Rule 12602
- ▶ FINRA Rule 13602
- ▶ FINRA Rule 13512
- ▶ FINRA Rule 13513

Generally, FINRA arbitrators permit non-party witnesses to bring their attorneys to the hearing while they are testifying. During the hearing, the attorney's participation usually involves the attorney making objections based on generally recognized privileges. To enhance the appearance of fairness in the arbitration process, however, FINRA is amending Rule 12602 of the Code of Arbitration Procedure for Customer Disputes and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes to provide expressly that a non-party witness' attorney may attend a hearing while the witness is testifying. Unless otherwise authorized by the panel, the attorney's role will be limited to the assertion of recognized privileges, such as the attorney-client and work-product privileges, and the privilege against self-incrimination. The attorney must be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia or any commonwealth, territory or possession of the United States, unless state law prohibits such representation.

The amendments become effective on October 14, 2010, and apply to all hearings taking place on or after that date.

Endnotes

- 1 Exchange Act Release No. 62521 (July 16, 2010). 75 Federal Register 42795 (July 22, 2010) (File No. SR-FINRA-2010-006).
- 2 Rules 12512 and 13512 (Subpoenas) provide that arbitrators have the authority to issue subpoenas for the production of documents or the appearance of witnesses. The rules permit a party to make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party.
- 3 Rules 12513 and 13513 (Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas) provide that the panel may order the appearance of any employee or associated person of a FINRA member firm.
- 4 Rules 12602 and 13602 (Attendance at Hearings) provide that parties and their representatives are entitled to attend all hearings and that, absent persuasive reasons to the contrary, expert witnesses should also be permitted to attend. The panel determines who else may attend any or all hearings.

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Attachment A

Code of Arbitration Procedure for Customer Disputes And Code of Arbitration Procedure for Industry Disputes

Customer Code

12602. Attendance at Hearings

- (a) The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.
- (b) An attorney for a non-party witness may attend a hearing while that non-party witness is testifying. Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination. The attorney must be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.
- (c) The panel will decide who else may attend any or all of the hearings.

Industry Code

13602. Attendance at Hearings

- (a) The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.
- (b) An attorney for a non-party witness may attend a hearing while that non-party witness is testifying. Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination. The attorney must be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.
- (c) The panel will decide who else may attend any or all of the hearings.

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